IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 30821

KRISPEN ESTRADA,	)	
	)	**2005 Opinion No. 58**
Petitioner-Appellant,	)	
	)	**Filed: October 4, 2005**
v.	)	
	)	**Stephen W. Kenyon, Clerk**
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge.

Order denying petition for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kristina M. Schindele, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

After being convicted of rape, Krispen Estrada filed an action for post-conviction relief in which he alleged that he had been compelled to submit to a psychosexual evaluation for sentencing purposes in violation of his Fifth Amendment privilege against self-incrimination. Estrada claimed that he had received ineffective assistance of counsel because his defense attorney did not advise him of his privilege to refuse the psychosexual evaluation and did not move to suppress the evaluator's report. Following an evidentiary hearing, the trial court denied Estrada's claims. We affirm.

I.
FACTS AND PROCEDURE

In the underlying criminal case, Estrada pleaded guilty to the rape of his estranged wife in violation of Idaho Code § 18-6101, and an associated charge of kidnapping was dismissed. Prior to sentencing, the district court ordered a psychosexual evaluation of Estrada pursuant to I.C. § 18-8316. Estrada initially was uncooperative with the evaluator, and he wrote a letter to the

court expressing his view that the evaluation was unnecessary. Ultimately, however, at the urging of counsel, Estrada submitted to the evaluation. The evaluator issued a report that did not favor Estrada, concluding that he was in the "maximum risk range" on the sexual assault scale and on the violence scale. The district court imposed a unified life sentence with a twenty-five-year determinate term, relying significantly on the negative evaluation. This Court affirmed the sentence on direct appeal. *State v. Estrada*, Docket No. 27737 (Ct. App. July 23, 2002) (unpublished).

Thereafter, Estrada filed a petition for post-conviction relief, asserting claims of ineffective assistance of counsel relating to his participation in the psychosexual evaluation. Estrada contended that his trial attorney's performance was deficient in that the attorney did not advise him that, even after his guilty plea, he continued to possess a Fifth Amendment privilege against self-incrimination and that, as a result, he could not be compelled to participate in the court-ordered psychosexual evaluation. Estrada also asserted that his attorney was ineffective for failing to move to suppress the evaluation report and preclude its consideration at sentencing on the basis that the evaluation was obtained in violation of Estrada's right against self-incrimination.

After an evidentiary hearing, the district court held that defense counsel's performance was deficient in that he did not advise Estrada of his Fifth Amendment privilege with respect to the evaluation. Based upon this finding, the district court did not reach the remaining issues regarding deficient performance. The district court concluded, however, that Estrada had suffered no prejudice as a result of the deficient performance because the psychosexual evaluation did not affect the length of Estrada's sentence. Estrada appeals.

II.
ANALYSIS

In order to prevail on an ineffective assistance of counsel claim, an applicant must demonstrate both that his attorney's performance was deficient, and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995); *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To show deficient performance, a defendant must overcome the strong presumption that counsel's performance was adequate by demonstrating that counsel's representation did not meet objective

standards of competence demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 687; *Roman v. State*, 125 Idaho 644, 648-49, 873 P.2d 898, 902-03 (Ct. App. 1994). If a defendant succeeds in establishing that counsel's performance was deficient, he must also prove the prejudice element by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Id.* at 649, 873 P.2d at 903.

Estrada argues on appeal that the district court erred in its finding of lack of prejudice from his defense attorney's deficient service. However, we must first address the State's argument that the district court erred in finding deficient performance in the first instance.

A. The Fifth Amendment Privilege Against Self-incrimination Applies in Psychosexual Evaluations Ordered by the Court for Sentencing Purposes

The State first argues that Estrada could not prove deficient performance by his defense counsel because a criminal defendant in a non-capital case has no Fifth Amendment privilege to refuse participation in a psychosexual evaluation that is conducted to provide information to the court for sentencing. This is an issue of first impression in Idaho. We conclude that the State's position is not well taken.

Our analysis begins with the seminal United States Supreme Court decision, *Estelle v. Smith*, 451 U.S. 454 (1981). Smith was charged with capital murder, and the trial court ordered a psychiatric examination to determine Smith's competency to stand trial. Smith was later tried by jury and convicted. At the sentencing phase, the state called the psychiatrist as a witness to establish Smith's future dangerousness, after which the death penalty was imposed. In subsequent federal habeas corpus proceedings, Smith asserted that use of the psychiatrist's testimony at the penalty phase violated Smith's Fifth Amendment privilege against compelled self-incrimination because Smith was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a sentencing proceeding. The Supreme Court concluded that the privilege against self-incrimination extended to the sentencing phase, rejecting the state's argument that the Fifth Amendment privilege is irrelevant to the penalty phase because "incrimination is complete once guilt has been adjudicated." *Id.* at 462. The Supreme Court stated:

> The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to

> convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Culombe v. Connecticut*, 367 U.S. 568, 581-82 (1961) (opinion announcing the judgment) (emphasis added). *See also Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964); E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955).
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> The Court has held that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In re Gault*, 387 U.S. 1, 49 (1967). In this case, the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist. Just as the Fifth Amendment prevents a criminal defendant from being made "'the deluded instrument of his own conviction,'" *Culombe v. Connecticut, supra*, at 581, quoting 2 HAWKINS, PLEAS OF THE CROWN 595 (8th ed. 1824), it protects him as well from being made the "deluded instrument" of his own execution.
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> We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned.

Id. at 462-63 (footnote omitted).[1]

More recently, in a non-capital case, *Mitchell v. United States*, 526 U.S. 314 (1999), the Supreme Court held that a guilty plea does not function as a waiver of the right to remain silent at sentencing. *Id.* at 321-25. The Court observed that, according to the express language of the Fifth Amendment, the privilege against self-incrimination applied to "any criminal case," which included, as a matter of law and common sense, the sentencing hearing. *Id.* at 327. The Court explained that until sentence has been imposed, a defendant may legitimately fear adverse consequences from further testimony. Therefore, the privilege applies until the sentence has been fixed and the judgment of conviction has become final. *Id.* at 325-27. The Supreme Court also rejected an assertion that a trial court may draw an adverse inference from a defendant's silence in sentencing proceedings. The Court adhered, instead, to "[t]he normal rule . . . that no negative inference from the defendant's failure to testify is permitted." *Id.* at 327-28. Thus, under *Estelle* and *Mitchell*, a criminal defendant's privilege against self-incrimination is not

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[1] The Supreme Court also rejected the State's argument that the Fifth Amendment was not violated because Smith's statements were not used for the testimonial content of what was said. The Court held that because the psychiatrist's conclusions were based on Smith's statements and omissions, the privilege against self-incrimination was implicated. *Estelle*, 451 U.S. at 463-65.

extinguished by a plea of guilty and continues until the sentence is fixed and the judgment is final.

The Idaho Supreme Court correctly anticipated *Mitchell* in *State v. Wilkins*, 125 Idaho 215, 868 P.2d 1231 (1994), where the Court held that the Fifth Amendment privilege protects a defendant against compelled testimony at the sentencing hearing in a non-capital case. Our Supreme Court held that a guilty plea waives the privilege against self-incrimination only for the limited purposes of establishing a factual basis for the plea and determining whether the plea is entered freely and voluntarily. *Id.* at 217-18, 868 P.2d at 1233-34. After the entry of a guilty plea, the Court said, a defendant has the right to remain silent at sentencing to the same extent as that afforded a defendant convicted at a trial. *Id.* at 218, 868 P.2d at 1234.

In Idaho, the privilege against self-incrimination through the sentencing phase is also protected by a statute, I.C. § 19-3003, which provides:

> A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding.

In *State v. Anderson*, 130 Idaho 765, 770, 947 P.2d 1013, 1018 (Ct. App. 1997), we held that this statute applied at a sentencing hearing. *See also State v. Heffern*, 130 Idaho 946, 949, 950 P.2d 1285, 1288 (Ct. App. 1997).

It is thus beyond dispute that a defendant at a sentencing hearing may invoke the privilege against self-incrimination and that no negative inference from the defendant's invocation of the privilege is permitted with regard to the sentence imposed.

The next question is whether a different result obtains where the proceeding involved is a court-ordered psychosexual evaluation conducted for the purpose of informing the court's sentencing decision. We conclude that the privilege may be asserted in this context as well. Although the Fifth Amendment states that a person shall not be "compelled in a criminal case to be a witness against himself," the United States Supreme Court has long held that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but rather upon the nature of the statement or admission and the exposure which it invites. *In re Gault*, 387 U.S. 1, 49 (1967). The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory. *Id.* It attaches also in interviews with probation officers, *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984), and in

presentence interviews, *Jones v. Cardwell*, 686 F.2d 754, 756 (9th Cir. 1982); *Williams v. Chrans*, 945 F.2d 926, 951 (7th Cir. 1991); *United States v. Oliveras*, 905 F.2d 623, 625-26 (2nd Cir. 1990). In the context of a psychosexual evaluation, the risk of self-incrimination is obvious. First, as in the instant case, a sentencing court can use the defendant's statements to the evaluator or the evaluator's conclusions, drawn from the defendant's statements, as a basis to impose a harsher sentence than might otherwise have been chosen. Second, a defendant's disclosures made under the evaluator's questioning may expose the defendant to additional criminal charges for other offenses.

Our conclusion that a defendant is entitled to invoke the privilege against self-incrimination with respect to a court-ordered mental health assessment for use at sentencing is consistent with a comment by our Supreme Court, albeit in dicta, in *State v. Wood*, 132 Idaho 88, 100, 967 P.2d 702, 714 (1998). The Court there noted that if an evaluator had been appointed to prepare a psychological report for purposes of sentencing, counsel for the defendant "would have had the opportunity to advise his client of the possible uses of the information and of the privilege against self-incrimination." Additionally, in *State v. Odiaga*, 125 Idaho 384, 391, 871 P.2d 801, 808 (1994), the Idaho Supreme Court also implied, without directly holding, that in the absence of an insanity defense, an order granting a prosecution motion to compel a pretrial psychological evaluation would be violative of the Fifth Amendment. The few decisions that we have found from other jurisdictions addressing the issue have held that the privilege against self-incrimination entitles a defendant to refuse participation in a presentence psychosexual or mental health evaluation. *See State v. Diaz-Cardona*, 98 P.3d 136, 138 (Wash. Ct. App. 2004); *Dzul v. State*, 56 P.3d 875, 877-78 (Nev. 2002); and *Commonwealth v. M.G.*, 75 S.W.3d 714, 724 (Ky. Ct. App. 2002).

We have been referred to no authority holding to the contrary. The State has cited two Idaho Supreme Court decisions, *State v. Griffin*, 122 Idaho 733, 838 P.2d 862 (1992), and *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), for its contention "that routine presentence investigation activities do not implicate Fifth Amendment concerns." Upon examination, however, neither case supports the State's position. In *Griffin*, the defendant asserted that the trial court violated his right to due process and his right against self-incrimination by enhancing his sentence based upon Griffin's refusal to identify his drug suppliers during cross-examination at his trial. The Supreme Court never reached the self-incrimination issue, however, because it

resolved the question of the trial court's alleged misuse of the defendant's reticence concerning his drug sources on other grounds. *Id.* at 738-40, 838 P.2d at 186-69. The *Griffin* opinion does include a statement that "[r]ecently, this Court upheld the use of admissions . . . made to presentence investigators, in the face of claims that the statements . . . violated the defendant's right against self-incrimination." *Id.* at 737, 838 P.2d at 866. This comment does not suggest a view that defendants possess no privilege against self-incrimination in presentence investigation interviews, however, for a conclusion that a right has not been violated is not the equivalent of a conclusion that the right never existed.

In *Pizzuto*, our Supreme Court held that the trial court properly admitted testimony at the sentencing hearing concerning a presentence interview conducted years earlier in another state where the defendant had not been advised of his *Miranda* rights.[2] *Pizzuto*, 119 Idaho at 759-60, 810 P.2d at 697-98. *Pizzuto* did not hold that the defendant possessed no right against self-incrimination that he could have invoked during the presentence interview. Rather, the issue in *Pizzuto* was whether such a right had been violated because the interviewer had not informed Pizzuto of it. Numerous decisions from other jurisdictions cited by the State also hold, as suggested in *Pizzuto*, that *Miranda* warnings are not required before a defendant may be subjected to a presentence interview. In fact, in a decision that inexplicably has not been cited by either party, *State v. Curless*, 137 Idaho 138, 44 P.3d 1193 (Ct. App. 2002), we have already held that an individual is not entitled to *Miranda* warnings before submitting to a psychosexual evaluation for sentencing. *Id.* at 144, 44 P.3d at 1199. These cases do not answer our present query, however, for whether the privilege against self-incrimination attaches in a particular circumstance and whether *Miranda* warnings must be given are not the same issues. One may hold the privilege against self-incrimination in a circumstance where the State is not obligated, under *Miranda*, to notify the interviewee of this right. *See*, *e.g.*, *Murphy*, 465 U.S. at 430-34 (recognizing that the privilege could have been invoked in interview with probation officer but holding that *Miranda* was inapplicable because the interview was not a custodial interrogation); *United States v. Cortes*, 922 F.2d 123, 125-27 (2nd Cir. 1990) (recognizing that defendant

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[2] *See Miranda v. Arizona*, 384 U.S. 436 (1966), which held that before subjecting an individual to custodial interrogation, law enforcement officers must warn the individual that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, retained or appointed.

possessed Fifth Amendment right to remain silent in presentence interview but holding that *Miranda*-type warnings prior to the interview were not required); *Dzul*, 56 P.3d at 879 (holding that "while the right against self-incrimination clearly attaches at a court-ordered presentence psychosexual evaluation, a defendant is not entitled to *Miranda* warnings prior to the evaluation").

Accordingly, we reject the State's contention that the right against self-incrimination does not attach in presentence psychosexual evaluations.

B. Estrada Is Not Entitled to Relief for Ineffective Assistance of Counsel on the Grounds That Counsel Failed to Advise Him of the Right Against Self-incrimination or to Object to Consideration of the Psychosexual Evaluation at Sentencing

Having determined that the Fifth Amendment privilege applied and could have been invoked by Estrada during the psychosexual evaluation, we must next address whether Estrada's defense counsel was derelict in neither advising Estrada that he could invoke the privilege to refuse participation in the psychosexual evaluation nor objecting to consideration of the evaluation at sentencing on the ground that it was obtained in violation of Estrada's privilege against self-incrimination. Estrada's claim of ineffective assistance of counsel is premised on the long-established principle that the right to representation by counsel afforded by the Sixth Amendment means a right to be represented by reasonably competent counsel in an adequate fashion. *Strickland*, 466 U.S. at 685; *Aragon*, 114 Idaho at 760, 760 P.2d at 1176. *See also State v. Tucker*, 97 Idaho 4, 8, 539 P.2d 556, 560 (1975) (An accused is entitled to the reasonably competent assistance of a diligent, conscientious advocate.). This right attaches at all "critical stages" of the prosecution. *Kirby v. Illinois*, 406 U.S. 682, 690 (1972); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). For any proceeding that is a critical stage, the defendant is entitled to have counsel present and participating. *Maine v. Moulton*, 474 U.S. 159, 170-76 (1985); *Coleman v. Alabama*, 399 U.S. 1, 7-11 (1970); *Hamilton v. Alabama*, 368 U.S. 52 (1961). Conversely, if the proceeding at issue is not a critical stage, "there can be no constitutional violation, no matter how deficient counsel's performance." *United States v. Benlian*, 63 F.3d 824, 827 (9th Cir. 1995). *See also Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982);

We have previously held that a psychosexual evaluation in a non-capital case is not a critical stage to which the Sixth Amendment to counsel attaches. *See Curless*, 137 Idaho at 144-45, 44 P.3d at 1199-1200. In *Curless* we adopted the rationale expressed by the Ninth Circuit Court of Appeals in *Baumann v. United States*, 692 F.2d 565 (9th Cir. 1982) and *Hoffman v.*

Arave, 236 F.3d 523 (9th Cir. 2001), that the *Estelle* decision, concerning the use of a psychiatric evaluation to determine whether the death penalty should be imposed, should be read narrowly. *Curless*, 137 Idaho at 144-45, 44 P.3d at 1199-1200. Noting that in *Baumann* and *Hoffman* the Ninth Circuit held that the right to counsel did not apply to a routine presentence interview in a non-capital case, we concluded:

> The psychosexual evaluation in Curless's case was more akin to a presentence interview than the interview conducted to determine competency and future dangerousness in *Estelle*. The information provided in the evaluation allowed the district court to make a more informed, appropriate sentencing decision that best furthered the sentencing goals set forth in I.C. § 19-2521. In addition, we note that presentence investigations are usually conducted by state agents, while psychosexual evaluations are almost always conducted by neutral, third parties not employed by the state. Curless's case is not a capital case and did not involve a bifurcated jury proceeding. Following the rationale of the Ninth Circuit, we conclude that Curless's case is distinguishable from *Estelle* and, instead, more similar to the facts of *Baumann*. Therefore, we hold that Curless's psychosexual evaluation did not constitute a critical stage for Sixth Amendment purposes.

Curless, 137 Idaho at 145, 44 P.3d at 1200.[3] On that basis, we rejected Curless's claim that he received ineffective assistance of counsel when counsel failed to advise him of the possible uses of the psychosexual evaluation or of his privilege against self-incrimination.

Our analysis in *Curless* was perhaps truncated, for a conclusion that a psychosexual evaluation is not a critical stage of the proceedings at which a defendant is entitled to the *presence* of counsel does not necessarily compel a conclusion that a defendant is not entitled to competent *advice* about the evaluation, before it occurs, from the attorney representing him in the sentencing proceedings. In *Curless*, we followed the reasoning in *Baumann*, where the Ninth Circuit held that because the presentence interview was not a critical stage of the proceedings, any denial of the advice of counsel in making the decision whether to submit to the interview "was constitutionally insignificant." *Baumann*, 692 F.2d at 578.

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[3] In addition to the Ninth Circuit, many other federal circuit courts have held that a presentence interview does not constitute a critical stage in the adversary proceedings and that the Sixth Amendment right to counsel therefore does not attach. *See United States v. Washington*, 11 F.3d 1510, 1517 (10th Cir. 1993); *United States v. Bounds*, 985 F.2d 188, 194 (5th Cir. 1993); *United States v. Tisdale*, 952 F.2d 934, 940 (6th Cir. 1992); *United States v. Johnson*, 935 F.2d 47, 50 (4th Cir. 1991); *United States v. Jackson*, 886 F.2d 838, 844-45 (7th Cir. 1989). *But see, contra, State v. Bankes*, 57 P.3d 284, 289 (Wash. Ct. App. 2002).

Whether the same analytical jump must follow from our conclusion that a section 18-8316 psychosexual evaluation is not a critical stage of the prosecution is not determinative of Estrada's claim, however, for even if Estrada's right to effective assistance encompassed a right to competent advice in advance of the psychosexual evaluation (particularly in light of Estrada's expressions of reluctance to participate), his counsel cannot be deemed deficient. The Sixth Amendment entitles criminal defendants to reasonably competent counsel, but not to perfect or prescient counsel. *Nelson v. Estelle*, 642 F.2d 903, 908 (5th Cir. 1981) ("[C]ounsel is normally not expected to foresee future new developments in the law . . . ."); *Brown v. United States*, 311 F.3d 875, 878 (8th Cir. 2002) (holding that counsel's performance was not deficient for failing to predict future developments in the law). Until our decision today, no decision of the Idaho appellate courts or of the United States Supreme Court had held that a defendant may invoke the privilege against self-incrimination in a court-ordered mental health evaluation conducted for sentencing in a non-capital case. Our decision in *Curless* expressly left this question unresolved. *Curless*, 137 Idaho at 143, 44 P.3d at 1198. Thus, when Estrada's evaluation occurred, the attachment of the privilege was not clear; indeed, the State has argued vigorously in this appeal that it did not exist. In their briefs on this appeal, neither party has cited a case directly addressing this issue, and our own research has yielded few authorities directly on point from other jurisdictions. Therefore, we hold that, as a matter of law, the failure of Estrada's counsel to advise Estrada concerning the privilege against self-incrimination as it applied to the psychosexual evaluation, and counsel's failure to file a suppression motion for alleged violation of the privilege, did not constitute incompetent representation.

We also conclude that Estrada's counsel cannot be faulted for failing to move to suppress the psychosexual evaluation report because such a motion would not have been meritorious. Estrada's claim that his counsel should have filed a suppression motion is based upon the premise that Estrada was compelled to disclose information during the evaluation in violation of the Fifth Amendment privilege. If there was no such violation, counsel could not be deficient for omitting to file an unmeritorious motion to suppress. *See State v. Hairston*, 133 Idaho 496, 512, 988 P.2d 1170, 1186 (1999); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995); *Huck v. State*, 124 Idaho 155, 158-59, 857 P.2d 634, 637-38 (Ct. App. 1993).

As we noted in *Curless*, the Fifth Amendment prohibits only compelled self-incrimination; it does not preclude the use in court of self-incriminatory statements that were

made voluntarily. *Curless*, 137 Idaho at 143, 44 P.3d at 1198. Therefore, a witness ordinarily must invoke the privilege in order to claim its protection. *Id.* An exception applies, however, where the witness knows that an assertion of the privilege would be penalized, or a penalty is threatened, so that a free choice to remain silent is foreclosed and the witness is compelled to give incriminating testimony. *Murphy*, 465 U.S. at 434; *Curless*, 137 Idaho at 143, 44 P.3d at 1198.[4] That is, the State may not induce a witness to forego the Fifth Amendment privilege by threatening to impose sanctions capable of forcing the self-incrimination that the amendment forbids. *Murphy*, 465 U.S. at 434.

In *Murphy*, the United States Supreme Court made clear that it is the threat of punishment for invoking the privilege, not the mere requirement that a witness appear and give testimony, that constitutes a Fifth Amendment violation. *Id.* at 435. The defendant in *Murphy* made incriminating statements in response to a probation officer's queries. The defendant argued his statements were compelled because he feared that his probation would be revoked if he failed to answer, but he did not claim that he was expressly told that an assertion of the privilege during the interview would result in revocation of his probation or other penalty. The Supreme Court held that the defendant had not demonstrated that his statements to the probation officer were given under compulsion even though he had been informed that he was required to be truthful with his probation officer in all matters and that failure to do so could result in revocation of probation. The Supreme Court said that the mere requirement to appear and be truthful

> . . . did not in itself convert Murphy's otherwise voluntary statements into compelled ones. In that respect, Murphy was in no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination. The answers of such a witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege.

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[4] Another exception to the general rule that a witness must claim the privilege in order to enjoy its protections applies to an individual who is subjected to custodial interrogation without having received *Miranda* warnings. *See Miranda*, 384 U.S. 436. However, in *Curless*, 137 Idaho at 144, 44 P.3d at 1199, we held that an interview by a court-appointed psychosexual evaluator did not constitute interrogation of the type to which *Miranda* applies. Estrada does not argue on appeal that his statements to the evaluator were suppressible for violation of his *Miranda* rights.

Id. at 427. The Court therefore rejected Murphy's claim, concluding that Minnesota did not attempt to take the "extra, impermissible step" of threatening punishment for invocation of the privilege. *Id.* at 436-39.

Here, the record shows that after the district court ordered a psychosexual evaluation for use at sentencing, Estrada initially balked at participating in the evaluation. He wrote a letter to the district court complaining that the evaluation was a tactic to waste time and delay his sentencing. Defense counsel received a copy of the letter and responded with a letter to Estrada stating that the evaluation was not a delay tactic but, rather, that the district court had ordered the evaluation and unless the court changed its mind, the evaluation had to be completed prior to sentencing. A short time later, the evaluator wrote to defense counsel that the evaluator was unable to complete the evaluation in a timely manner because Estrada had not completed written assessments and other necessary materials. Defense counsel then wrote another letter to Estrada, saying:

> I received a letter from [the evaluator] stating that you are not cooperating with your evaluation. I understand that you do not want to participate in the evaluation. The evaluation was, however, ordered by Judge Higer. We would not want the judge to consider your lack of cooperation to mean that you are not willing to comply with court orders. Please consider cooperating with [the evaluator] during the evaluation process.

Estrada argues that in these circumstances, he was threatened with a penalty if he were to invoke his privilege against self-incrimination.

We are unconvinced. The district court's initial order that a psychosexual evaluation of Estrada be prepared for use at sentencing does not constitute a threat of penalty for a later invocation of the privilege against self-incrimination any more than does a subpoena ordering a witness to appear and testify at a trial. There is no evidence that the district court either expressly or by implication asserted that invocation of the privilege would be penalized. *Compare Wilkins*, 125 Idaho at 217-18, 868 P.2d at 1233-34 (district court erroneously denied a defense motion seeking, on the basis of the privilege against self-incrimination, to preclude the prosecution from calling the defendant as a witness at sentencing); *Anderson*, 130 Idaho at 769-70, 947 P.2d at 1017-18 (trial court erroneously forced defendant to testify at sentencing by threatening to use his silence as an aggravating factor); *Heffern*, 130 Idaho at 949-50, 950 P.2d at 1288-89 (district court erroneously penalized defendant for asserting privilege against self-incrimination at sentencing).

Nor did the evaluator's letter threaten a penalty for non-cooperation. The evaluator's comments amounted to an explanation that the evaluation could not be completed until Estrada provided the necessary information. This is nearly identical to the situation in *Curless*, where we held that a statement in a psychosexual evaluation agreement indicating that the defendant's failure to fully participate would jeopardize the evaluation process and possibly result in an inability to render an evaluation was not a threat of penalty but only an explanation of practical consequences of failure to participate. *Curless*, 137 Idaho at 144, 44 P.3d at 1199. Finally, statements by defense counsel urging Estrada to cooperate did not amount to a threat of penalty, for to excuse one's failure to invoke the Fifth Amendment privilege, the penalty or threat must come from the State. *Colorado v. Connelly*, 479 U.S. 157, 170 (1986); *United States v. White*, 846 F.2d 678, 688-89 (11th Cir. 1988); *Luna v. Massachusetts*, 354 F.3d 108, 111 (1st Cir. 2004).

Thus, there is no evidence in the record that Estrada was threatened with a penalty if he were to assert the privilege against self-incrimination during interviews with the evaluator. Accordingly, Estrada waived the privilege against self-incrimination by failing to invoke it before or during the psychosexual evaluation, and statements he made during the evaluation therefore were not suppressible for violation of the privilege. It follows that his attorney did not provide deficient representation by failing to bring a suppression motion.

III.
CONCLUSION

Estrada has not shown that his lawyer provided inadequate representation either in failing to advise Estrada that he could invoke his privilege against self-incrimination to prevent the psychosexual evaluation or in failing to move for suppression of the evaluation report. Therefore, we hold that the district court correctly denied Estrada's petition for post-conviction relief, albeit on grounds different than those expressed by the district court.

The district court's order denying post-conviction relief is affirmed.

Chief Judge PERRY and Judge GUTIERREZ **CONCUR.**